denied seats in the House by virtue of that provision.(2)

Cross References

Administration of the oath and challenges to the right to be sworn, see Ch. 2, supra.

Administration of the oath to officers, officials, and employees, see Ch. 6, supra.

Conduct, punishment, censure, and expulsion, see Ch. 12, infra.

§ 13. Incompatible Offices

The Constitution prohibits service as a Member of Congress to one holding an office under the United States during the continuancy thereof; it also prohibits any Member from being appointed during his term to any civil office under the United States which was created or the emoluments of which were increased during his term.(3) The first prohibition, against holding incompatible offices, was designed to avoid executive influence on Members of Congress and to protect the principle of the separation of powers.(4) The latter prohibition attempts to ensure the disinterested vote of Members of Congress in creating civil offices and in increasing the salaries and privileges of such offices.(5) To bar

because of its exhaustive definition of disloyalty. See the extensive discussion at 1 Hinds' Precedents § 449 on whether that oath was unconstitutional, the House finding that it was not, despite a decision by the Supreme Court that the oath was unconstitutional as applied to lawyers, since it operated to perpetually exclude persons from a profession in an ex post facto manner. See *Ex parte Garland*, 4 Wall. 333 (1866). The minority opposition in the House to the 1862 oath argued that the oath was unconstitutional for two reasons: first, it was an ex post facto law, punishing individuals, without a trial, for offenses committed before the enactment; second, it purported to add qualifications to those enumerated in the Constitution for Members.

2. See 1 Hinds' Precedents §§ 449, 451, 459, 620.

3. Art. I, § 6, clause 2.

4. See The Federalist No. 76 (Hamilton), Modern Library (1937), and Story, *Commentaries on the Constitution of the United States* §§ 866–869, Da Capo Press (N.Y. repub. 1970). There was little discussion of this provision at the Constitutional and Ratifying Conventions, its purpose being self-evident.

5. "The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the Representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the ex-

appointment, the increased emolument must be measurable and must accrue to the appointee upon taking office.(6)

The holding of incompatible offices may be challenged either by Members of the House or by private citizens at the convening of Congress.(7) On some occasions, the House has assumed or declared the seat vacant of a Member who has accepted an incompatible office.(8) A resolution excluding a Member who has accepted such an office may be agreed to by a majority vote.(9)

One issue arising from the interpretation of the prohibition against the holding of incompatible offices is the point in time at which a Member-elect must remove himself from the incompatible office.(10) The main question is whether a Member-elect may continue to hold an incompatible office up to the time of convening of Congress or even beyond the initial meeting of Congress.(11) It has

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tent of the principle; for his appointment is restricted only 'during the time, for which he was elected'; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination." Story, *Commentaries on the Constitution of the United States* § 864, Da Capo Press (N.Y. repub. 1970).

6. See §§ 13.4, et seq., infra.

7. See, generally, *House Rules and Manual* §§ 95–98 (comment to U.S. Const. art. I, § 6, clause 2) (1973).

The Committee on the Judiciary has jurisdiction over the acceptance by Members of incompatible offices. *House Rules and Manual* § 707 (1973).

8. See 1 Hinds' Precedents §§ 488, 492, 501, 502, 572; 6 Cannon's Precedents § 65.

9. 1 Hinds' Precedents § 490. A majority vote is sufficient since the House is the sole judge of the qualifications of its Members. U.S. Const. art. I, § 5, clause 1.

10. For a summary of the precedents and rulings, see *House Rules and Manual* §§ 95–98 (1973) (comment to U.S. Const. art. I, § 6, clause 2).

11. For instances where Members-elect were held to have disqualified themselves for seats in the House by holding incompatible offices beyond the convening of Congress, see 1 Hinds' Precedents §§ 492, 500.

For decisions allowing Members-elect to defer the choice between the incompatible office and the congressional seat beyond the assembly of Congress, see 1 Hinds' Precedents §§ 498, 503. See also § 13.1, infra, for a recent precedent on the issue.

The rationale for allowing Members-elect to defer satisfying the age and citizenship requirements of the Constitution until appearing to take the oath (see §§ 10.1, 10.2, supra) would appear to allow the deferral of the choice between incompatible offices to the same point in time. See S. REPT. NO. 904, 74th Cong. 1st Sess., reprinted at 79 CONG. REC. 9651–53, 74th Cong. 1st Sess.

been established that a Member-elect is not disqualified from taking his seat if he holds an incompatible office up to the day Congress convenes.(12)

The most recent precedent in relation to this issue occurred in the Senate at the opening of the 85th Congress, when a Senator-elect continued to hold a state executive position until five days after the meeting of Congress, when he appeared to take the oath; there was not, however, any explicit ruling on the subject, as his right to be sworn was not challenged.(13) The Senator-elect in that case waived his congressional salary up to the time of taking the oath.(14)

The House has affirmatively decided that an election contestant holding an incompatible office need not make his selection until the House has declared him entitled to the seat. 1 Hinds' Precedents § 505.

12. See 1 Hinds' Precedents § 499. In 15 Op. Att'y Gen. 281 (1877) it was concluded that a Member-elect could continue to act as a government contractor up to the time Congress met.

13. See § 13.1, infra.

14. In 14 Op. Att'y Gen. 406 (1874) it was proposed that since a Member-elect could lawfully hold an office under the United States until appearing to be sworn, he was entitled to receive pay for both positions before becoming a sworn Member. That conclusion was based in part on the decision in *Converse* v *U.S.,* 62 U.S. 463 (1859) that a person holding two compatible offices under the government is not precluded from receiving the salaries of both by any provision of the general laws prohibiting double compensation (see also 9 Op. Att'y Gen. 508 [1860]; 12 Op. Att'y Gen. 459 [1868]).

See, however, the determination of the House at 1 Hinds' Precedents § 500 that a Member-elect receiving pay as a military officer was disqualified from taking his congressional seat or from receiving any congressional salary as of the moment the Congress to which he was elected convened, regardless of the time when he would appear to take the oath (the main issue before the committee was not the status of that Member-elect, who resigned before taking the oath, but the entitlement to salary of his successor). That precedent, inferring that a Member-elect becomes a full Member upon the assembly of the House, is at variance with other rulings expressing the conclusion that he does not become a Member until being sworn (see for example, 1 Hinds' Precedents § 499).

A report cited at 1 Hinds' Precedents § 184, while determining that a Member-elect could receive compensation for another governmental office before the convening of Congress, stated that the precedents in the House did not "determine that he [the Member-elect] may also be compensated as a Member of Congress for the same time for which he was compensated in the other office."

Extensive House debate on the meaning of the word "office" as used in the constitutional provision suggests that the appointment of Members-elect as commissioners without legislative, executive, or judicial powers is not incompatible.(15) A prohibited office is one characterized by tenure, duration, emoluments, and duties inconsistent with those of a Member of Congress.(16)

Various federal statutes prohibit Members from holding certain enumerated offices inconsistent with membership(17) and from contracting with the government.(17)

The Constitution does not prohibit Members of Congress from holding state elective or appointive offices. The House has determined, however, that a high state office is incompatible with congressional membership, due to the manifest inconsistency of the respective duties of the positions.(19) In addition, many state constitutions and statutes prohibit state elective or appointive officials from holding congressional seats.(20) Some state statutes which require candidates for congressional seats to first resign from state offices have been challenged on the ground that they unconstitutionally add to the qualifications of Members-elect

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The committee chose to leave the question open in their report.

15. See 1 Hinds' Precedents § 493.

16. See *U.S.* v *Hartwell,* 73 U.S. 385, 393 (1868) and § 13.2, infra.

A Member may undertake temporary paid service for the executive (see 1 Hinds' Precedents § 495 and 2 Hinds' Precedents § 993).

17. See 12 USC § 303 (board of governors, Federal Reserve System, Director of Federal Reserve Bank); 18 USC § 204 (practice before Court of Claims); 25 USC § 700 (practice before Indian Claims Commission).

18. The House has declined to hold that a contractor with the government is disqualified to serve as a Member (see 1 Hinds' Precedents § 496); see, however, 18 USC § 203(a) (no compensation for a Member for services relating to proceedings where government party or interest); 18 USC § 431 (no contracts by Member with government); 33 USC § 702m (no interest, flood control contracts); 41 USC § 22 (no interest, all contracts with government).

19. See 6 Cannon's Precedents § 65. For instances where Senators-elect held high state positions beyond the meeting of Congress, but before taking the oath, see § 13.1, infra, and 1 Hinds' Precedents § 503.

20. See, for example, Pa. Const. art. 12, § 2. See also *State ex rel. Davis* v *Adams,* 238 So.2d 415 (Fla. 1970) (in course of discussing a Florida statute on the subject, the court listed the following states with similar constitutional or statutory provisions: Arizona, Wisconsin, Oklahoma, Delaware, Indiana, Washington).

and Senators-elect.(1) The common law concept that one may not hold incompatible offices and the requirement that Members of Congress attend upon the sessions of the House and Senate would act as bars to the holding of most state offices by Members of Congress.(2)

Cross References

Military service as incompatible office, see § 14, infra.
Incompatible offices as related to Delegates and Resident Commissioners, see § 3, supra.
House officers, officials, and employees and incompatible offices, see Ch. 6, supra.

Incompatible Offices

§ 13.1 A Senator-elect deferred his choice between an incompatible state office and his congressional seat until he appeared to take the oath, after the convening of Congress.(3)

Jacob K. Javits, Senator-elect from New York, did not appear on Jan. 3, 1957, the opening day of the 85th Congress, to take the oath with the rest of the Senate, but was administered the oath on Jan. 9, 1957.(4) No objection was made to the administration of the oath to Mr. Javits, although he did not resign from his position as Attorney General of the State of New York until the day he appeared to take the oath of office in the Senate.(5) Mr. Javits waived his congressional salary for the period prior to his taking of the oath.(6)

§ 13.2 The House passed a bill denying extra compensation

1. The Supreme Court dismissed an appeal from one such state court case which held that the state could require a candidate to resign from a sheriff position before entering the race. *State ex rel. Davis* v *Adams*, 238 So.2d 415 (Fla. 1970), stay granted, 400 U.S. 1203 (J. Black in Chambers) (1970), appeal dismissed, 400 U.S. 986 (1970).
2. See 6 Cannon's Precedents § 65 and 1 Hinds' Precedents § 563.
3. Although the Constitution is silent on Members of Congress holding high state offices, the House has ruled that such an office is incompatible with congressional membership (see 6 Cannon's Precedents § 65).

   Numerous cases of Members-elect holding incompatible offices have produced, after much discussion, the principle that a Member-elect or contestant to a seat may continue to hold such office until he is actually sworn and seated in the House, since a Member-elect does not yet have the status of a "Member" under U.S. Const. art. I, § 6, clause 2. See 1 Hinds' Precedents §§ 184, 492–505.
4. 103 CONG. REC. 340, 85th Cong. 1st Sess.
5. *Biographical Directory of the American Congress 1774–1971*, S. Doc. No. 92–8 pp. 1183, 1184, 92d Cong. 1st Sess. (1971).
6. *Senate Manual* § 863 (1971).

for any Member appointed as a United Nations representative to avoid the prohibition against holding incompatible offices.[7]

On Dec. 18, 1945, the House was considering a proposed bill to provide for the participation of the United States in the United Nations.[8] A committee amendment was offered to the bill, denying compensation for the position of representative to the United Nations for any Member of the Senate or House of Representatives who might be designated as such representative; the amendment had: been drafted in order to avoid the possible conflict of a Member holding an incompatible office with compensation, under article I, section 6, clause 2, of the Constitution.[9]

Before the House agreed to the amendment denying compensation to a Member,[10] Mr. Sol Bloom, of New York, explained that the amendment would not preclude a Member of the House or Senate appointed as representative to the United Nations from receiving an expense allowance for duties connected with the office.[11]

§ 13.3 A Member who had been accepted and confirmed as a new federal district judge submitted his congressional resignation to the governor of his state approximately three months prior to the effective date of that resignation.

On Oct. 2, 1963,[12] the Speaker laid before the House the resignation of Mr. Homer Thornberry, of Texas, to take effect on the 20th day of December 1963.

Parliamentarian's Note: Mr. Thornberry had been nominated

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7. For an instance where a Member of the House resigned to accept an appointment as a member of the U.S. delegation to the United Nations, see 111 CONG. REC. 25342, 89th Cong. 1st Sess., Sept. 28, 1965.

In the 88th Congress, S. Res. 142 was introduced and referred to committee, to inquire whether simultaneous service as a Senator and as a United Nations delegate violated the incompatibility provision. See 109 CONG. REC. 8843, 88th Cong. 1st Sess., May 16, 1963. No action was taken on the resolution.

8. 91 CONG. REC. 12267, 79th Cong. 1st Sess.

9. See H. REPT. NO. 1383, 79th Cong. 1st Sess. By removing compensation for the position, if held by a Member, the amendment removed the office from the Supreme Court's definition of an incompatible office, a "term (which) embraces the ideas of tenure, duration, emoluments, and duties." *U.S.* v *Hartwell*, 73 U.S. 385, 393 (1868).

10. 91 CONG. REC. 12286, 79th Cong. 1st Sess.

11. 91 CONG. REC. 12281, 79th Cong. 1st Sess.

12. 109 CONG REC. 18583, 88th Cong. 1st Sess.

on July 9, 1963, to be a federal district judge, and confirmed by the Senate on July 15, 1963. Mr. Thornberry withheld the effective date of his resignation because of the press of business in Congress and also because a special election had been scheduled for Dec. 9, 1963, in Texas.

Appointment to Civil Office

§ 13.4 The nomination of a Senator as a Justice to the Supreme Court was confirmed by the Senate in the 75th Congress, despite constitutional challenges that a new retirement provision had increased the emoluments and positions for Supreme Court Justices, and that the Senator could not be appointed without violating U.S. Constitution article I, section 6, clause 2.[13]

On Aug. 12, 1937, the President submitted to the Senate the nomination of Hugo Black, then Senator from Alabama, to be an Associate Justice of the Supreme Court.[14]

On Aug. 16, 1937, Senator Wallace H. White, Jr., of Maine, arose to state his intention to oppose the nomination of Senator Black, on the ground that Senator Black's appointment would violate article I, section 6, clause 2, of the Constitution, prohibiting the appointment of a Member of Congress to a civil office which shall have been created or the emoluments of which shall have been increased during the time for which he was elected.[15]

Senator White based his challenge on the Retirement Act of Mar. 1, 1937:

> Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code.

Senator White stated that the act had given to a Justice the new financial emolument of retirement with a salary that could not be diminished by taxation or by other means, as well as the emoluments of the certainty of unlimited compensation and the privilege of voluntary judicial service while a retired Justice.[16] On the same day, Senator Frederick Steiwer, of Oregon, arose to state that he

13. A private citizen sought Supreme Court review of the appointment of the Senator, alleging violation of art. I, § 6, clause 2, but was denied standing in *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam).

14. 81 CONG. REC. 8732, 75th Cong. 1st Sess.

15. *Id.* at pp. 8951–58.

16. *Id.* at p. 8954.

shared Senator White's opinion, and added that not only had the emoluments been increased, but also an entirely new civil office had been created, by adding an "inactive retired Justice" to the Court.(17)

On Aug. 17, 1937, Senator Black's nomination was reported favorably to the Senate, and extensive debate ensued on the constitutional challenge, as stated in part by Senator Edward R. Burke, of Nebraska:

> I . . . say with respect to the matter of eligibility, that a new office was created, and our colleague cannot be boosted into that new office until the term for which he was elected has expired. But even beyond all that, as clear as the English language can express it, the Retirement Act of March 1, 1937, increases the emoluments of the office of Justice of the Supreme Court, and the provisions of the Constitution prohibit any Senator during the term for which he was elected from ascending to that office.(18)

Senator Tom T. Connally, of Texas, arose to support the nomination and to state that the Retirement Act had in no way created a new office or added to the emoluments of Supreme Court Justices.(19)

The Senate rejected the constitutional challenge to Senator Black's nomination, and confirmed his appointment.(20)

§ 13.5 A Member resigned from the House, his resignation to be effective on the day of transmittal, in order to avoid the constitutional prohibition against being appointed to a civil office under the United States of which the salary shall have been increased during the time for which the Member was elected.(1)

On Feb. 27, 1969,(2) Mr. James F. Battin, of Montana, notified the House that he had submitted his

17. *Id.* at p. 8961.

18. 81 CONG. REC. 9077, 75th Cong. 1st Sess. The debate extends at 81 CONG. REC. from 9068 to 9103.

19. *Id.* at pp. 9082–88.

20. *Id.* at p. 9103. For the view of a commentator that the constitutional prohibition was not violated in Senator Black's case, see Corwin, *The Constitution of the United States of America: Analysis and Interpretation,* p. 101 (1953).

1. The constitutional provision has been interpreted to mean that the critical time, as to when the appointment is effective, is when the President signs the certificate of appointment, following Senate confirmation. See *In re Accounts of Honorable Matt W. Ransom, For Compensation as Envoy to Mexico, Decisions of the Comptroller of the Treasury,* Vol. 2, p. 129, dated Sept. 6, 1895.

2. 115 CONG. REC. 4734, 91st Cong. 1st Sess.

resignation as a Member to the Governor of his state, to be effective at 3:30 p.m. on the day of transmittal. At that precise hour he was sworn in as a United States district judge, which appointment had been confirmed by the Senate on Feb. 25, 1969.

Mr. Battin resigned at the time he did and took the oath of judge at the hour of 3 :30 p.m. on Feb. 27 in order to assume office before Mar. 1, which would have been the effective date of a judicial pay raise enacted by the Congress.[3] Mr. Battin therefore avoided violating the constitutional prohibition against a Member of Congress being appointed to a civil office whose emoluments had been increased during the Member's term.

§ 13.6 The Senate confirmed the appointment of a Member of the House to a cabinet office where at the time of appointment there was a possibility, but not a certainty, that a proposed salary increase for the position could receive final approval at a future date.

On Jan. 20, 1969, the Senate confirmed without discussion the nomination of Mr. Melvin R. Laird, of Wisconsin, then a Member of the House, as Secretary of Defense.[4] Mr. Laird resigned his House membership on Jan. 23, 1969.[5]

During Mr. Laird's prior term as a Member of the House, Congress had enacted the Federal Salary Act of 1967, which provided for a salary commission to make recommendations to the President on proposed increases for executive, legislative, and judicial salaries, and for the President to embody those recommendations in his next proposed budget to Congress.[6]

Under that act, proposed salary increases for cabinet officials and others were pending before Congress when Mr. Laird was nominated and confirmed as Secretary of Defense.[7]

3. The judicial pay raise was effectuated by Pub. L. No. 90–206, 81 Stat. 642, codified as 2 USC §§ 351–361, which created a commission to recommend salary increases to the President, who would then embody those recommendations in his budget request. For the President's proposed 1969 salary increases, see note to 2 USCA § 356.

4. 115 CONG. REC. 1294, 91st Cong. 1st Sess.

5. 115 CONG. REC. 1571, 91st Cong. 1st Sess.

6. Pub. L. No. 90–206, 81 Stat. 642, codified as 2 USC §§ 351–361.

7. See note following 2 USCA § 358. The proposed increases were submitted to Congress on Jan. 15, 1969.

The Attorney General of the United States had advised Mr. Laird, in an opinion dated Jan. 3, 1969, that article I, section 6, clause 2 of the Constitution did not prohibit the appointment of a legislator to an office when at the time of his appointment it was possible but not certain that a proposed salary increase for that office could receive final approval at a future date.(8)

§ 13.7 In the 93d Congress, a bill was passed decreasing the salary for the position of Attorney General of the United States, in order that Senator could be nominated to the position without violating article I, section 6, clause 2 of the United States Constitution.

On Dec. 10, 1973, the President signed into law Public Law 93–178, 87 Stat. 697, which read in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the compensation and other emoluments attached to the Office of Attorney General shall be those which were in effect on January 1, 1969, notwithstanding the provisions of the salary recommendations for 1969 increases transmitted to the Congress on January 15, 1969, and notwithstanding any other provision of law, or provision which has the force and effect of law, which is enacted or becomes effective during the period from noon, January 3, 1969, through noon, January 2, 1975.(9)

The decrease in the salary for Attorney General was necessary in order to avoid violating article I, section 6, clause 2 of the Constitution, which provides that no Senator or Representative shall, during the time for which elected, be appointed to a civil office, the emoluments of which shall have been increased during such time. The President had nominated Senator William B. Saxbe, of Ohio, as Attorney General, and the salary for the position had been increased during his term as a Senator.

§ 14. —Military Service

Early Congresses determined that active duty with the United States Armed Forces was incompatible with congressional membership.(10) On many occasions, the House has declared or assumed vacant the seats of Members who have accepted officers' commissions in branches of the

8. See 42 Op. Atty Gen. 36.

9. 119 CONG. REC. 40266, 93d Cong. 1st Sess., Dec. 7, 1973.

10. See 1 Hinds' Precedents §§ 486–492, 494, 500, 504.